

ARKANSAS COURT OF APPEALS
NOT DESIGNATED FOR PUBLICATION
LARRY D. VAUGHT, JUDGE

DIVISION III

CA07-829

March 5, 2008

VELLA A. FOX

APPELLANT

APPEAL FROM THE WASHINGTON
COUNTY CIRCUIT COURT
[CV2006-1893-2]

V.

ARKANSAS DEPARTMENT OF
HEALTH & HUMAN SERVICES

APPELLEE

HON. KIM MARTIN SMITH,
JUDGE

AFFIRMED

Appellant Vella Fox applied for Long Term Care Medicaid but was found ineligible for those benefits by appellee Department of Health and Human Services. The Washington County Circuit Court affirmed the denial. On appeal, Fox argues that (1) the trial court erred in refusing to allow her to present additional evidence and (2) there was insufficient evidence to support the trial court's denial of benefits. We affirm.

On December 1, 2005, Fox, who was eighty years old and in poor health, entered a nursing home. To assist with the cost of the care, Fox, on January 11, 2006, applied for Long Term Care Medicaid with the Washington County DHS. Fox's daughter, Susan, held a power of attorney for Fox and handled the application for benefits. Fox was awarded benefits beginning February 1, 2006; however, she was denied benefits for December 2005 and January 2006 because her countable resources exceeded the limit of \$2000. In denying benefits

for those two months, the Washington County DHS office relied in part upon an annual statement from the Principal Life Insurance Company, which reflected that Fox owned a life insurance policy with a cash value of \$2033.16.

Following the denial of benefits for December 2005 and January 2006, Fox requested an administrative hearing, which was held on July 20, 2006. It was learned at the hearing that the Principal Life policy had a face value of \$30,000. Susan, on behalf of her mother, testified that while the stated cash value of the policy was \$2033.16, that amount should be reduced because there was an outstanding loan against the policy in the amount of \$16,000. Susan testified:

... the net cash value of \$2033 in, in my opinion should be offset by the fact that there is a \$16,000 loan against the policy so I could not cash in the policy without paying off this \$16,000 loan. So it's my argument that there really isn't a \$2000 cash value to the policy. It's really got a negative value because of the loan against it.

Susan further testified that none of the accumulated interest on the \$16,000 loan—totaling approximately \$973—had been paid.

DHS offered the testimony of Brenda Bass, a DHS family-support specialist, who was assigned to Fox's claim. Bass testified that her duties include Long Term Care Certification, which involves interviewing clients and determining their eligibility for Long Term Care. According to Bass, when Fox made her application for benefits, she was receiving \$961.50 a month in social security income, had a bank account balance of \$65.56, and had two life insurance policies—a Life Investors policy with a cash value of \$569.20 and the Principal Life

policy with a cash value of \$2033.16. Because these countable assets exceeded the resource limit, Bass testified that Fox was ineligible for Long Term Care Medicaid.

On July 26, 2006, the hearing officer entered a final order, affirming the Washington County DHS's denial of benefits. The hearing officer found that the preponderance of the evidence demonstrated that Fox was ineligible for Long Term Care Medicaid because her countable resources were in excess of \$2000. Fox appealed the final order by filing a complaint in the Washington County Circuit Court on August 25, 2006.

On November 27, 2006, Fox filed a motion for leave to present additional evidence and remand for further proceedings. In this motion, Fox argued that she had obtained two letters from Principal Life ("Principal Life letters") that support her position that she is entitled to Long Term Care Medicaid. The trial court denied the motion, finding that Fox failed to show a good reason for failing to timely obtain and present the Principal Life letters.

A hearing before the trial court was held May 31, 2007. After arguments from counsel, the court affirmed the hearing officer's final order denying Fox benefits. The trial court found, among other things, that Fox failed to demonstrate good cause supporting her request to present additional evidence and that substantial evidence supported the hearing officer's decision because the Principal Life annual statement established that the cash value of the policy exceeded the resource limit. The trial court entered an order outlining these findings on June 19, 2007.

Fox's first point on appeal is that the trial court erred in refusing to allow her to present the Principal Life letters as additional evidence. Arkansas Code Annotated section

25-15-212(f) (Repl. 2002) permits the circuit court to order that additional evidence be taken before the administrative agency if the court finds that the evidence is material and that there were good reasons for failure to present it in the proceeding before the agency.

We have held that, when a party applies for leave to present additional evidence under section 25-15-212(f), the trial court should first view the application for additional evidence to determine if the party was diligent; that the trial court may then in the exercise of its discretion conduct a hearing to determine if the additional evidence fits within the requirements of the statute; and that, if the trial court finds that under the requirements of the statute additional evidence should be taken, the trial court may then remand to the appropriate agency to hear the additional evidence. *Dep't of Fin. & Admin. v. Samuhel*, 51 Ark. App. 76, 909 S.W.2d 656 (1995). The trial court's decision to grant or deny a motion to present additional evidence is within the discretion of the trial court and should not be overturned absent an abuse of that discretion. *See Samuhel, supra; Marshall v. Alcoholic Beverage Control Bd.*, 15 Ark. App. 255, 692 S.W.2d 258 (1985).

The only reason Fox gives for not presenting the Principal Life letters in July 2006 is that the letters did not exist then. She argues that the letters were not created until September 2006; therefore, it was impossible to introduce them any earlier. The trial court found that this was not a good reason for not timely obtaining the letters.

The record demonstrates that Fox was capable of timely presenting evidence from Principal Life because she was the party who provided the 2005 Principal Life annual statement to DHS for consideration with the application for benefits. The record further

establishes that the Principal Life letters were requested by Susan, on behalf of Fox, because they are addressed to Susan. What is not clear from the record is why Fox could not timely present these letters, *i.e.*, why Fox did not request and present the Principal Life letters in January 2006, when she applied for benefits, or in July 2006, at the administrative hearing. To the contrary, the record is completely void of any explanation as to why the letters were not requested and presented at these earlier times. Moreover, as of August 2006, when Fox filed her complaint in circuit court, she never mentioned the need for these letters, the importance of these letters, or that she had requested these letters and was waiting for them.

The Principal Life letters were first discussed by Fox in her November 2006 motion to present additional evidence. In this motion, Fox again failed to give any reason for failing to obtain and present these letters when she applied for benefits in January 2006 or at the July 2006 administrative hearing. In light of the facts that Fox failed to give any reason, good or otherwise, for not timely presenting the Principal Life letters, we cannot say that the trial court abused its discretion in refusing to grant Fox's motion to present additional evidence.

For her second point on appeal, Fox argues that there is insufficient evidence supporting the trial court's finding that she was not eligible for Long Term Care Medicaid. The rules governing judicial review of administrative decisions are the same for both the circuit and appellate courts and this review is limited in scope: administrative decisions will be upheld if supported by substantial evidence and not arbitrary, capricious, or characterized by an abuse of discretion. *Samuhel, supra*. In determining whether there is substantial evidence, we review the entire record rather than merely the evidence supporting the administrative

decision. *Id.* To establish an absence of substantial evidence to support the decision, an appellant must demonstrate that the proof before the administrative tribunal was so nearly undisputed that fair-minded men could not reach its conclusion. *Williams v. Scott*, 278 Ark. 453, 647 S.W.2d 115 (1983). Finally, the question is not whether the testimony would have supported a contrary finding but whether it supports the finding that was made. *Id.*

Fox's claim for benefits in this case arises under the Medicaid program, created by federal law but administered in part by the Arkansas DHS. The DHS Medical Services Manual, § 3000 et seq., sets forth the guidelines applicable Long Term Care Medicaid. To be eligible for these benefits, an individual's countable resources cannot exceed \$2000. Medical Services Manual, § 3310(2)(c)(5). Resources are generally defined as those assets, including both real and personal property, which an individual possesses. *Id.* at § 3330. Resources include all liquid assets as well as those assets which are not presently in liquid form. *Id.* Life insurance policies that have a cash surrender value in excess of \$1500 are counted against the resource limit. *Id.* at § 3332.3(2)(a).

The record demonstrates that Fox is not eligible for Long Term Care Medicaid because she had countable resources in excess of \$2000. The only document Fox timely offered into evidence was the Principal Life annual statement, which reflected a cash value for that policy in excess of \$2000. Furthermore, she had a bank account with a balance of \$65.56 and second life insurance policy with Life Investors with a cash value of \$569.20.

Fox argued to the trial court that the hearing officer erred because he did not deduct from the cash value the interest on the loan taken on the Principal Life policy. She argued that

deducting the loan interest of \$982.14 and adding the dividend of \$917.57 would result in a cash value less than \$2000. The cash value of the Principal Life policy in that case would be \$1968.59, which is less than \$2000; however, in making this argument, Fox ignores her other countable resources—her savings account and second life insurance policy, which total \$634.76. In such a case, Fox’s countable resource would be \$2603.35.

Because substantial evidence supports the trial court’s finding that Fox had countable resources in excess of \$2000, we affirm the trial court’s denial of Long Term Care Medicaid.

Affirmed.

GRIFFEN and BAKER, JJ., agree.